80-758

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No. 80-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE S.S. ZOE COLOCOTRONI, MARBONANZA COMPAÑIA NAVIERA, S.A., COLOCOTRONI LTD., COLOCOTRONI BROTHERS, S.A., THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG) and THE WEST OF ENGLAND SHIP OWNERS MUTUAL INSURANCE ASSOCIATION (LONDON) LIMITED,

Petitioners,

-against-

THE COMMONWEALTH OF PUERTO RICO and THE ENVIRONMENTAL QUALITY BOARD OF THE COMMONWEALTH OF PUERTO RICO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Questions Presented

1. Whether, consistently with the Due Process Clause of the Fifth Amendment to the Constitution and the Due Process Clause of Section 2 of the Organic Act of Puerto Rico, a Puerto Rico federal court may exercise *in personam* jurisdiction over a foreign marine protection and indemnity insurance company in an admiralty action, if the insurer's only contacts with the forum were its retainer of a Puerto Rico law firm and the fact that ships covered under its policies of indemnity insurance occasionally have been present in the territorial waters of Puerto Rico?

2. Whether the court of appeals' decision upholding personal jurisdiction over foreign insurance companies conflicts with the decision of this Court in *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980)?

3. Whether, consistently with the Due Process Clause of the Fifth Amendment to the Constitution and the Due Process and Equal Protection Clauses of Section 2 of the Organic Act of Puerto Rico, a foreign insurance company may be held to a more stringent standard for determining whether it is amenable to the personal jurisdiction of the Puerto Rico federal court in an admiralty action, than other non-resident corporations?

4. Whether a foreign marine protection and indemnity insurance company may be sued directly in the Puerto Rico federal court by a party injured as a result of the acts of its insured where, by the terms of the policy of insurance, which was neither delivered nor issued for delivery in Puerto Rico, the insured's right to recover from the insurer does not arise until payment is first made by the insured in respect of any liability, costs or expenses and where no such payment has been made?

5. Whether damages for injuries to mangrove swamplands caused by oil pollution may be awarded under a

Puerto Rico statute providing for recovery of "the total value of the damages caused to the environment and/or natural resources" where there has been no diminution in fair market value of the real property impacted by oil and no loss of use, and where the swamplands will recover through the process of natural regeneration?

6. Whether the court of appeals' decision on measurement of damages to real property conflicts with the decisions of other courts of appeals?

The Parties

Defendants, petitioners herein, are the S.S. ZOE COLOCOTRONI, an oil tanker of Greek ownership and Panamanian registry, her owners, Marbonanza Compañia Naviera, S.A., their agents, Colocotroni Ltd. and Colocotroni Brothers, S.A., the ship's protection and indemnity insurer, The West of England Ship Owners Mutual Protection and Indemnity Association (Luxembourg) (hereinafter "West of England-Luxembourg") and West of England-Luxembourg's managing agents, The West of England Ship Owners Mutual Insurance Association (London) Limited (hereinafter "West of England-London"). "West of England," as used herein in the singular, refers to both of the West of England defendants.

Plaintiffs, respondents herein, are the Commonwealth of Puerto Rico and the Environmental Quality Board ("EQB") of the Commonwealth of Puerto Rico.

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Opinions Below

The prior opinions most pertinent to this Petition are the August 12, 1980 Opinion of the United States Court of Appeals, 628 F.2d 652 (1st Cir. 1980), reproduced in the Appendix at 1a[1], the August 16, 1978 Opinion of the district court, 456 F. Supp. 1327 (D.P.R. 1978) (57a), and the unreported Opinion and Order of the district court filed January 14, 1977 (109a).

Other opinions of the courts below reproduced in the Appendix are the July 10, 1979 Opinion of the court of appeals, 601 F.2d 39 (1st Cir. 1979) (49a); the June 11, 1979 Memorandum and Order of the court of appeals (55a); the Opinions and Orders of the district court of October 21, 1977 (103a), November 7, 1975 (119a), September 17, 1975 (121a), April 11, 1974 (122a), April 8, 1974 (124a), January 31, 1974 (137a), July 3, 1973 (15[illegible]) and June 19, 1973 (155a), and the United States Magistrate's Report and Recommendation of March 21, 1974 (126a).[2]

Jurisdiction

The Judgment of the court of appeals, entered on August 12, 1980, is reproduced in the Appendix to this Petition. (159a). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

This petition involves the following statutory provisions, set forth in full in the Appendix hereto: Section 20.030 of the Puerto Rico Insurance Code (Puerto Rico Direct Action Statute), 26 L.P.R.A. § 2003(1) (1977) (162a); Section

1. Page references to the Appendix to this Petition, which is bound separately, are cited "__a."

2. The Magistrate's Report and Recommendation of March 25, 1974 is included in the Appendix because it was adopted by the district court in its order of September 17, 1975.

11.190 of the Puerto Rico Insurance Code, 26 L.P.R.A. § 1119 (1978) (163a); Rule 4.7(a)(1) of the Puerto Rico Rules of Civil Procedure (Puerto Rico Long-Arm Statute), 32 L.P.R.A., App. II, R.4.7(a)(1) (1977) (161a); and Section 11(29) of the Public Policy Environmental Act of the Commonwealth of Puerto Rico, 12 L.P.R.A. § 1131(29) (1978) (160a). It also involves the Due Process Clause of the Fifth Amendment to the Constitution, which provides "No person shall . . . be deprived of life, liberty or property, without due process of law," and the Due Process and Equal Protection Clauses of Section 2 of the Organic Act of Puerto Rico,[3] 48 U.S.C. § 737 (1952), which provide:

> "No law shall be enacted in Puerto Rico which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws."

Statement of the Case

A. Summary of the Pertinent Facts

1. *The Oil Spill*

On March 18, 1973, while on a voyage for her time charterer, the S.S. ZOE COLOCOTRONI spilled about 5000 tons of medium crude oil near the southwest coast of Puerto Rico. (1a-2a). Oil from the ZOE COLOCOTRONI came ashore in Bahía Sucia ("Dirty Bay"),[4] at the southwest corner of Puerto Rico, polluting the shoreline and several

3. The same guarantees of due process and equal protection afforded by the Fourteenth Amendment to the Constitution have been extended to Puerto Rico by Section 2 of the Organic Act. South Porto Rico Sugar Co. v. Buscaglia, 154 F.2d 96, 99-100 (1st Cir. 1946); Ballester-Ripoll v. Court of Tax Appeals of Puerto Rico, 142 F.2d 11, 18-19 (1st Cir. 1944), *cert. denied*, 323 U.S. 723(1944).

4. The court of appeals wrote:

> "The district court noted that the configuration of Bahía Sucia, together with the prevailing winds and currents, made the bay a natural trap for floating debris, including small quantities of petroleum and tar." (6a-7a, footnote omitted.)

groves of mangrove trees. It is undisputed that mangrove trees and marine organisms were killed by the oil spill, although there is disagreement as to the extent of damage. (7a-14a). The Commonwealth of Puerto Rico is the owner of the entire area polluted by oil. (31a,n.20).

2. *The Insurance Companies*

Both West of England-Luxembourg and West of England-London are foreign corporations without any formal ties to Puerto Rico. Neither has ever maintained an office or agent in Puerto Rico, nor has it sold insurance, performed services or solicited business there. (24a). Moreover, as the court of appeals conceded, "the record . . . does not indicate any explicit undertaking by West of England to insure vessels in Puerto Rican waters." (28a).

The ZOE COLOCOTRONI was insured by West of England-Luxembourg under a marine protection and indemnity ("P&I") insurance policy. The terms and conditions of this policy are set forth in the 1972 edition of the Rules of West of England-Luxembourg. (SA166, SA190.)[5] The insurance contract does not, by its terms, specifically cover risks arising in Puerto Rico, nor does this worldwide policy specifically exclude such risks from coverage.

Among the terms and conditions of the P&I policy covering the ZOE COLOCOTRONI is a "no action" clause, barring recovery by a shipowner from West of England-Luxembourg before a payment has been made:

> "18. Unless the Association in its absolute discretion shall otherwise determine, it shall be a condition precedent of an insured Owner's right to recover from the funds of the Association in respect of any liability, costs or expenses that he shall first have discharged or paid the same." (SA198)

5. Page references to the 10 volume Appendix used before the court of appeals are cited "A___," and the 3 volume Consolidated Supplemental Appendix as "SA___."

Vessels insured by West of England have visited and operated within the territorial waters of Puerto Rico, and matters which could give rise to claims by owners for indemnification under their P&I policies, such as the ZOE COLOCOTRONI oil spill, have occurred in Puerto Rico. (27a) There is no evidence that West of England had knowledge that the ZOE COLOCOTRONI would visit Puerto Rico. To the contrary, the ship was on a time charter, and its itinerary was not revealed to West of England.

Pursuant to West of England-Luxembourg's Rules, it may employ lawyers, surveyors and other persons on behalf of insured owners in connection with matters which could give rise to claims by the owners for indemnification. (SA208, SA257). The West of England defendants have retained "correspondents" in maritime jurisdictions around the world[6] to attend to such matters. The San Juan, Puerto Rico law firm of Hartzell, Ydrach, Mellado, Santiago, Perez & Novas was named on West of England's lists of correspondents, and from time to time provided services to insured shipowners at the request of West of England. (SA74, SA183). It also has represented West of England in direct actions, including the instant case.

There is no evidence of any other "contacts" between West of England and Puerto Rico.

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6. West of England's lists of correspondents contained the following notice:

> "Whilst the Association does not appoint agents, the following are the names of experts and lawyers usually engaged to advise on claims in which the Association is concerned. Captains and agents should consult them in cases of emergency and difficulty connected with matters covered by the Rules of the Association, when there is not time to apply to their owners for instructions. . . . Asterisk denotes lawyers." (SA63, SA172).

B. The Proceedings Below

1. *The Proceedings in the District Court*

Plaintiffs brought suit on March 19, 1973 for the costs of oil removal and clean-up and for environmental damages. Jurisdiction in the district court was based upon 28 U.S.C. § 1333(1) (admiralty). (58a)

West of England moved to quash service of process, purportedly made pursuant to the Puerto Rico Direct Action and Long-Arm Statutes, and to dismiss the action against it. This motion was denied by the district court in its Opinion and Order of January 14, 1977 (109a), in which the court wrote: "[I]t seems apparent that an insurance policy issued in favor of a vessel follows the vessel whereever it sails. . . ." (116a)

In December 1977, the case was tried on the question of damages only, the issue of liability having been resolved against the defendants as a sanction for their failure to appear for depositions. (103a). A survey of the area affected by oil had been conducted in October, 1977 by plaintiffs' expert engineer, Rafael Cruz Perez, and was accepted into evidence. (A1389). It showed that petroleum residues had been found in about 15 acres of land on the west side of Bahia Sucia, of which about 3.5 acres contained mangroves ("West Mangrove").[7] (8a, see map at 102a). Defendants' expert marine biologist, Dr. Edward S. Gilfillan, testified that he expected the area to be restored by natural processes within ten to fifteen years, if not less (12a), but plaintiffs' experts were not in agreement.

The only evidence of the market value of the lands polluted by oil was an appraisal report by defendants' real estate expert on contemporaneous sales of like property. (A1809). *See* RESTATEMENT (SECOND) OF TORTS, § 911,

7. The Cruz Perez survey also purported to find oil on land on the east side of Bahia Sucia, but the district court held that plaintiffs had failed to prove that the east side had been damaged. (8a,85a).

Comment f (1979); *Standard Oil Co.* v. *Southern Pacific R.R.*, 268 U.S. 146, 155 (1925). It showed that land near the site of the oil spill and similar to the affected property had been sold for between $3,000 and $5,670 per acre during the period from 1971 through 1977. (A1820-A1821, 35a-36a). There was no evidence in the record that the fair market value of the lands impacted by oil had diminished as a result of the oil spill.

In its decision of August 16, 1978, the district court ruled that the Commonwealth of Puerto Rico had standing to sue by reason of its proprietary interest in the affected property and pursuant to the common law doctrines of "trustee of the public trust" and *parens patriae*. (69a). The Court also held that the EQB had a cause of action arising under Section 11(29) of the Puerto Rico Public Policy Environmental Act.[8] (70a).

The district court awarded plaintiffs their oil removal expenses of $78,108.89, and, although it recognized that the area would recover naturally in time, environmental damages in the amount of $6,086,083.20, including $5,526,583.20 for the purported loss of 92,109,720 marine organisms and $559,500 for replanting, fertilizing and monitoring mangrove trees. (85a-86a). It denied plaintiffs' request for over $7,000,000 in damages for removal of oiled sediments and mangroves, on the ground that such an operation "would bring about the total destruction of this environment without any real guarantee of ultimate success." (86a).

2. *The Decision of the Court of Appeals*

The court of appeals vacated the district court's award of environmental damages, but ruled against defendants on the questions presented in this Petition—jurisdiction over

8. Section 11(29) of the Puerto Rico Public Policy Environmental Act authorizes suits by the EQB "to recover the total value of the damages caused to the environment and/or natural resources." (160a).

West of England and measurement of damages—and remanded the case to the district court for reevaluation of environmental damages. (1a-48a).

a. Jurisdiction Over West of England

The court of appeals held that West of England had "carrie[d] out business transactions within Puerto Rico" for purposes of the Commonwealth's long-arm statute (161a), and accordingly was within the personal jurisdiction of the Puerto Rico federal court. It concurred with the district court that "West of England's business contacts with Puerto Rico—in particular, its regular writing of insurance covering vessels like the ZOE COLOCOTRONI, which visited Puerto Rico and operated within Puerto Rican waters—satisfied both the statutory and constitutional tests." (26a). West of England's writing of protection and indemnity insurance policies, which were worldwide in geographic coverage, was held to be sufficient to confer personal jurisdiction over it on the ground that these "contracts of insurance contained no provision preventing any ship from calling on Puerto Rico, or limiting coverage in the event it did." (27a). Under the decision below, West of England would expressly have to exclude Puerto Rico from the coverage of its policies of marine insurance, which contain no territorial limitations, to avoid being subjected to the personal jurisdiction of the Puerto Rico courts. (29a).

In addition, the court below cited West of England's relationship with the Hartzell law firm in support of its decision on jurisdiction. However, the court's findings with respect to the Hartzell firm are seemingly inconsistent. First, it affirmed the trial court's finding that any purported "non-legal" activities of the Hartzell law firm as a "correspondent" of West of England "were so 'substantially intertwined with Hartzell's primary professional

functions' as defendants' retained law firm that it could not hold Hartzell to be a 'managing or general agent' for purposes of accepting service of process on Hartzell's client." (25a, *quoting* 115a).

But the court also concluded that Hartzell's activities could be considered as "contacts" of West of England with Puerto Rico for jurisdictional purposes. Specifically, it ruled that West of England had "advertised" to owners the availability of claims services in Puerto Rico by listing Hartzell as a "correspondent," and that the cases handled by Hartzell should have put West of England on notice that ships it insured were visiting Puerto Rico:

> "While West of England was not engaged in selling insurance in Puerto Rico, its retention of the Hartzell law firm to perform services for insured owners and vessels in Puerto Rico demonstrates that West of England plainly expected its worldwide business of insuring maritime risks to embrace the territorial waters of Puerto Rico with some regularity." (27a).

The court of appeals added the following gratuitous comment:

> "The result we reach is further buttressed by the Supreme Court's occasional suggestions that the test for measuring minimum contacts for insurance companies may be somewhat less stringent than for other nonresident corporations because of the forum state's public policy interest in promoting effective redress for injuries. *See McGee* v. *International Life Insurance Co.,* 355 U.S. 220, 223 (1957); *cf. Hanson* v. *Denckla,* 357 U.S. 235, 252 (1958)." (30a,n.18).

The court of appeals did not explain why the provision of the West of England-Luxembourg's terms and conditions of insurance that indemnification would be made only after payment by the insured, which would have barred a contemporaneous action against West of England by the ZOE

COLOCOTRONI's owners, would not also have barred an action against West of England by third parties.

b. DAMAGES

The court of appeals found that the EQB had a cause of action under Section 11(29) of the Puerto Rico Public Policy Environmental Act for recovery of the "total value of the damages caused to the environment and/or natural resources;" the court did not reach the other questions of standing to sue. (30a-35a, 160a). The legislative history of the environmental statute offers no explanation of the origin of the quoted language or its intended meaning. Nor, to the best of our knowledge, have any courts, apart from the court below, had occasion to apply or interpret Section 11(29).

Since there was no showing of any diminution in market value or loss of use of the affected property, or of any loss of commercially valuable plant or animal life, defendants argued, under the well-established principles of common law, that no damages, other than clean-up expenses, should have been awarded to plaintiffs. See pp. 18-20 *infra*. However, in spite of the absence of any legislative or judicial guidelines for interpretation of the language of Section 11(29), the court below held that this statute "envisions the awarding of damages on a different basis than would have been traditionally allowed." (36a).

The court rejected defendants' contention that commercial or market value should serve as the standard for measuring "the total value of damages" under the environmental statute, and instead held the "primary standard for determining damages" to be "the cost reasonably to be incurred by the sovereign or its designated agency to restore or rehabilitate the environment in the affected area to its pre-existing condition, or as close thereto as is feasible

without grossly disproportionate expenditures."[9] (40a-41a). Since, as the court observed, "the EQB concedes the land [polluted by oil] has no significant commercial or market value" (36a), the district court has been authorized by this decision to award substantial damages on remand where none would be allowed under the traditional rules.[10]

The court of appeals failed to cite any authorities supporting its decision to abandon the traditional rules. Indeed, its decision is grounded primarily on the court's own speculation as to the meaning of the statutory language:

> "The Puerto Rico statute authorizing this action specifically empowers the EQB to recover 'the *total value* of the damages caused to the environment and/or natural resources' upon a violation of the anti-pollution provisions. 12 L.P.R.A. § 1131 (29) (emphasis added). Implicit in this choice of language, we think, is a determination not to restrict the state to ordinary market damages. Many unspoiled natural areas of considerable ecological value have little or no commercial or market value. Indeed, to the extent such areas have a commercial value, it is logical to assume they will not long remain unspoiled, absent some governmental or philanthropic protection. A strict application of the diminution in value rule would deny the state any right to recover meaningful damages for harm

9. On remand, the district court also has been instructed to take into consideration, *inter alia*, the possibility of complete natural regeneration, the cost of restoring the property affected by oil, the cost of restoring other areas where the presence of oil would not pose a hazard to ultimate success, and the cost of acquiring comparable lands for public parks. (41a-42a, 46a-47a).

10. Under the common law "diminution rule," the measure of damages for injury to real property is the difference in value immediately before and immediately after the event causing the injury, unless the land can be restored to its former condition at a cost less than the diminution in value, in which case, the cost of restoration is the proper measure. Damages may also be awarded for loss of use. See pp. 18-19 *infra*.

to such areas, and would frustrate appropriate measures to restore or rehabilitate the environment." (36a-37a).

* * *

"In enacting section 1131, Puerto Rico obviously meant to sanction the difficult, but perhaps not impossible, task of putting a price tag on resources whose value cannot always be measured by the rules of the marketplace." (38a).

Finally, the court observed:

"To say that the law on this question is unsettled is vastly to understate the situation. The parties in this lawsuit, and we ourselves, have ventured far into uncharted waters. We do not think plaintiffs could reasonably have been expected to anticipate where this journey would take us." (46a).

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals' Decision Upholding Personal Jurisdiction over the West of England Defendants Is in Direct and Irreconcilable Conflict with the Mandate of this Court, and Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings as to Call for Exercise of this Court's Power of Supervision.

The court of appeals' decision that the district court's exercise of personal jurisdiction over West of England did not offend the limitations imposed by the Due Process Clause of Section 2 of the Organic Act of Puerto Rico is in direct and irreconcilable conflict with the standards set forth by this Court. The decision below greatly expands the scope of long-arm jurisdiction and introduces a wholly novel dimension, in direct contravention of the ruling in *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980).

At the outset, the court of appeals correctly stated the "essential constitutional question" -- "whether West of England 'purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.' "[11] However, in an unprecedented departure from this well-founded test, the court predicated long-arm jurisdiction on West of England's protection and indemnity insurance contract with the ZOE COLOCOTRONI's owners, which insured against risks encountered wherever the vessel might travel. No purposeful action was cited as a ground upon which the district court exercised personal jurisdiction; the basis was West of England's failure specifically to exclude Puerto Rico from the coverage of its insurance policy.[12]

In short, the decision below for the first time places on a nonresident insurer the burden to act to prevent contact between its insureds and a remote forum, in order to avoid being subjected to jurisdiction *in personam* there.

A. The Decision of the Court of Appeals is in Direct Conflict with *World-Wide Volkswagen Corp.* v. *Woodson*

The decision of the court of appeals upholding jurisdiction over West of England is in direct conflict with the landmark case of *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980). In *World-Wide Volkswagen*, an Audi dealer and regional distributor resident in New York were held not to be amenable to suit in Oklahoma state court for

11. 26a, *quoting* Hanson v. Denckla, 357 U.S. 235, 253 (1958).

12. The court of appeals overlooked the fact that under West of England's protection and indemnity insurance contract, West of England is only required to indemnity the insured shipowner after payment has been made. (SA198). Where, geographically, a loss may have been sustained is not relevant to West of England, for unlike an automobile liability insurer, West of England does not stand in the shoes of the insured to defend claims wherever brought. (Under a liability policy, the insurer is required to shield the insured from liability. *See* 11 Couch on Insurance 2d § 44.4 (1963))

injuries arising from an accident in Oklahoma involving an allegedly defective automobile sold in New York. The dealer and distributor concededly could foresee that automobiles sold in New York would be driven from New York to the other contiguous states. Travel was facilitated by "an extensive chain of Volkswagen service centers throughout the country, including some in Oklahoma." 444 U.S. at 298-99 (footnote omitted.)

In reversing the judgment of the Oklahoma Supreme Court, this Court held:

> "[F]inancial benefits accruing to the defendant from a collateral relation to the forum State will not support jurisdiction if they do not stem from a constitutionally cognizable contact with that State. . . . In our view, whatever marginal revenues petitioners may receive by virtue of the fact that their products are capable of use in Oklahoma is far too attenuated a contact to justify that State's exercise of *in personam* jurisdiction over them." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. at 299 (citation omitted.)

The instant case, involving as it does a vessel, the "very purpose" of which "is to travel," *World-Wide Volkswagen*, 444 U.S. at 298, is factually analogous to *World-Wide Volkswagen*. Just as the petitioners in *World-Wide Volkswagen* had no idea where the vehicles they sold would be driven, West of England lacked knowledge of the routes to be traveled by the ZOE COLOCOTRONI, which was on a time charter and not in scheduled service. West of England, by insuring the ZOE COLOCOTRONI, no more purposefully availed itself of the benefits of doing business in remote jurisdictions than did the *World-Wide Volkswagen* petitioners. This Court has specifically rejected the notion that "[a]menability to suit . . . travel[s] with the chattel." *World-Wide Volkswagen,* 444 U.S. at 296.

The court of appeals purported to distinguish *World-Wide Volkswagen* on grounds that (1) ships insured by West of England visited Puerto Rico on numerous occasions, whereas only one automobile sold by the *World-Wide Volkswagen* petitioners was known to have entered Oklahoma; and (2) there was nothing the *World-Wide Volkswagen* petitioners could have done to prevent contact between the vehicle and Oklahoma, whereas West of England could have excluded Puerto Rico from the coverage of its insurance contracts. (29a). Neither point is well taken. Just as the *World-Wide Volkswagen* petitioners could foresee that any automobile they sold could be driven to Oklahoma, West of England could foresee that any of its insured's ships might on some occasion call on Puerto Rico. However, as this Court made clear, "the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen*, 444 U.S. at 297.

Moreover, we submit that the affirmative obligation placed upon West of England to exclude particular jurisdictions from the coverage of its contracts of insurance to avoid being subjected to personal jurisdiction in remote forums of the globe is analogous to subjecting the *World-Wide Volkswagen* petitioners to personal jurisdiction in Oklahoma because their automobile sale contracts did not prohibit use of the vehicle in Oklahoma.[13]

13. As a practical matter, exclusion of Puerto Rico from the coverage of marine insurance policies might not be in the best interests of the people of Puerto Rico. If such a policy exclusion were included in West of England's P & I insurance contracts, it would be impossible to enforce prospectively. Indeed, if a shipowner defied his policy exclusion by sending an oil tanker to Puerto Rico, third parties might well be without a remedy against the P & I insurer, even in the courts of England, for damages resulting from oil spilled by the ship, due to the owner's wilful violation of the terms of his policy.

In sum, the court of appeals has expanded the scope of long-arm jurisdiction in direct contravention of this Court's recent decision to the contrary. Unless reviewed by this Court, the court of appeals' decision could thwart the nationwide application of the standards set forth in *World-Wide Volkswagen* v. *Woodson,* and lead to much unnecessary litigation. Moreover, the decision below places unreasonable burdens on interstate and foreign commerce, by forcing indemnity insurers to police the travels of their insureds. Finally, by relying on the retention of a lawyer as evidence of jurisdictional presence, the court of appeals' ruling undermines the attorney-client relationship, without justification.

B. The Court Below Devised a Special "Minimum Contacts" Rule for Insurance Companies Which Would Deny Them Equal Proctection of the Laws

Furthermore, the court of appeals gratuitously found in *McGee* v. *International Life Insurance Co.*[14] and *Hanson* v. *Denckla*[15] "suggestions that the test for measuring minimum contacts for insurance companies may be somewhat less stringent than for other nonresident corporations because of the forum state's public policy interest in promoting effective redress for injuries." (30a, n.18) We submit that there are no such "suggestions" in these or any other decisions of this Court.

As explained in *Hanson* v. *Denckla,* the defendant insurance company in *McGee* actively transacted business in California, where suit was brought, soliciting business and accepting premiums in that state through the mails:

> "In *McGee,* the nonresident defendant solicited a reinsurance agreement with a resident of California. The offer was accepted in that State, and the insurance premiums were mailed from there until

14. 355 U.S. 220 (1957).
15. 357 U.S. 235 (1958).

> the insured's death. Noting the interest California has in providing effective redress for its residents when nonresident insurers refuse to pay claims on insurance they have solicited in that State, the Court upheld jurisdiction because the suit 'was based on a contract which had substantial connection with that State.'" *Hanson* v. *Denckla,* 357 U.S. at 251-52.

Clearly, a nonresident corporation transacting business under such circumstances would be subject to the personal jurisdiction of the State of California, whether it was marketing insurance or digital wristwatches.

We respectfully submit that a nonresident insurance company is entitled to be judged by the same jurisdictional standards as any other nonresident. The discriminatory standards enunciated by the court below are inconsistent with the rights of due process of law and equal protection of the laws guaranteed by Section 2 of the Organic Act of Puerto Rico.

II.

The Court of Appeals' Decision Upholding Direct Action against West of England Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings as to Call For Exercise of this Court's Power of Supervision

As noted above, the policy of insurance covering the ZOE COLOCOTRONI contained a "no action" clause preventing suit or recovery by the owners against West of England-Luxembourg before actual payment of a judgment or settlement. (SA198). It generally has been held that such a clause bars a direct action against the insurer, unless the clause is void under State law. *See Watson* v. *Employers Liability Assurance Corp.*, 348 U.S. 66 (1954).

Section 11.190 of the Puerto Rico Insurance Code permits the invalidation of such a "no action" clause, but it is applicable only to a "policy delivered or issued for delivery in

Puerto Rico." (163a). Since the policy herein was neither delivered nor issued for delivery in Puerto Rico, Section 11.190 does not apply, and a direct action under the Puerto Rico Direct Action Statute is "subject to the conditions of the policy," including the "no action" clause. (162a). *Cf. Hernandez* v. *Steamship Mutual Underwriting Association,* 388 F. Supp. 312 (D.P.R. 1974).

However, the court of appeals has completely ignored the "no action" clause in holding West of England to be amenable to suit in Puerto Rico. It has effectively rewritten the policy of indemnity insurance without statutory authority.

Since the court of appeals has assumed the powers of the legislature in a radical and far-reaching departure from the usual course of judicial proceedings, this Court should grant the writ of certiorari in the exercise of its power of supervision, and reverse the decision below. *Cf. Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U.S. 55, 67 (1959); *United States* v. *Standard Oil Co.*, 332 U.S. 301 (1947).

III.

The Court of Appeals' Decision Permitting the EQB to Recover Damages for Pollution of a Mangrove Swamp, in the Absence of Any Loss of Use or Diminution in Market Value, Is without Precedent and in Direct and Irreconcilable Conflict With Decisions of Other Federal Courts of Appeals.

The court of appeals' decision permitting the EQB to recover damages for injuries to real property where there has been no diminution in fair market value or loss of use is without judicial or legislative authority and in direct and irreconcilable conflict with decisions of other federal courts of appeals.

As noted previously, the EQB's cause of action arose under a Commonwealth statute providing for recovery of the "total value of the damages caused to the environment and/or natural resources." (160a). The court of appeals asserted that its novel and expansive interpretation of the

phrase "total value" was consistent with two federal statutes which became effective after the trial herein, the Clean Water Act Amendments of 1977 to Section 311 of the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. § 1321(f) (1979) (effective December 27, 1977), and the Outer Continental Shelf ("OCS") Lands Act Amendments of 1978, 43 U.S.C. § 1813(a) (1980).

However, the OCS Lands Act permits the assertion only of "[c]laims for economic loss", which the instant case does not involve. 43 U.S.C. § 1813(a). Section 311(f)(1) of the FWPCA sets a relatively low upper limit of $250,000 or $150 per gross ton, whichever is greater, on the total amount that can be recovered from a vessel carrying oil, for oil removal and restoration or replacement of natural resources. 33 U.S.C. § 1321 f(1),(4). Consequently, a claim under Section 311(f) would be restricted by the statutory limits, and not the vague admonitions of the court below, even if the statute were applicable.[16]

It is submitted that, in the absence of any legislative history of Section 11(29) of the Puerto Rico environmental act, the ordinary meaning of the words "total value of the damages caused to the environment and/or national resources" should be attributed to them, and damages should be measured by reference to the usual common law rules for measurement of damages to real property. *See Banks* v. *Chicago Grain Trimmers Association*, 390 U.S. 459, 465 (1968); *Leyerly* v. *United States*, 162 F.2d 79 (10th Cir. 1947). These rules are accurately set forth in the RESTATEMENT (SECOND) of TORTS § 929(1) (1979):

> "If one is entitled to a judgment for harm to land resulting from a past invasion and not amounting to a total destruction of value, the damages include compensation for

16. We are aware of no cases interpreting the provisions of the FWPCA or OCS Lands Act for recovery of damages for restoration or replacement of natural resources.

> (a) the difference between the value of the land before the harm and the value after the harm, or at his election in an appropriate case, the cost of restoration that has been or may be reasonably incurred,
> (b) the loss of use of the land, and
> (c) discomfort and annoyance to him as an occupant."

Sections (b) and (c) of RESTATEMENT § 929(1) are inapplicable here. Plaintiffs did not claim loss of use or loss of any personal or aesthetic values, for West Mangrove is far from pristine and has never yielded rents or profits. Its only inhabitants are two derelicts known as the Hermit and the Dogman, and the latter's "large collection of canine acquaintances." (4a, n.5). These hermits of West Mangrove are not plaintiffs and did not claim any legal interest in the property. *(Id.)*

The circumstances of the instant case clearly come within the rule of Comment b to RESTATEMENT § 929(1), which provides, in pertinent part:

> "If . . . the cost of replacing the land in its original condition is disproportionate to the diminution in the value caused by the trespass, unless there is a reason personal to the owner for restoring the original condition, *damages are measured only by the difference between the value of the land before and after the harm."* (Emphasis added.)

This "diminution rule" has been accepted and applied by other courts of appeals. *E.g., Associated Stations, Inc.* v. *Cedars Realty and Development Corp.,* 454 F.2d 184, 190 (4th Cir. 1972); *Bowes* v. *Saks & Co.,* 397 F.2d 113 (7th Cir. 1968); *Big Rock Mountain Corp. v. Stearns Roger Corp.,* 388 F.2d 165, 168 (8th Cir. 1968); *see also Cook Industries* v. *Barge UM-308,* 622 F.2d 851 (5th Cir. 1980); *Koninklijke Luchtvaart Maatschaapij. N.V.* v. *United Technologies Corp.,* 610 F.2d 1052 (2d Cir. 1979); *O'Brien Brothers, Inc.* v. *The Helen B. Moran,* 160

F.2d 502, 506 (2d Cir. 1947); *Missouri Baptist Hospital* v. *United States,* 555 F.2d 290 (Ct. Cl. 1977); *Gila River Pima-Maricopa Indian Community* v. *United States,* 467 F.2d 1351, 1357 (Ct. Cl. 1972); *Dodge Street Building Corp.* v. *United States,* 341 F.2d 641, 644 (Ct. Cl. 1965); *The Nyland,* 164 F.Supp. 741, 743 (D. Md. 1958); *DeArmon* v. *St. Louis,* 525 S.W.2d 795, 800 (Mo. App. 1975).

Further, with the exception of cases involving a "reason personal to the owner for restoring the original condition,"[17] damages for harm to natural resources have consistently been based upon the resources' commercial or market value and limited by the diminution rule. *See Wm. G. Roe & Co.* v. *Armour & Co.,* 414 F.2d 862 (5th Cir. 1969) (oranges); *Reynolds Metals Co.* v. *Lampert,* 316 F.2d 272 (9th Cir. 1963) (flowers); *W. H. Elliott & Sons Co.* v. *E. & F. King & Co.,* 291 F.2d 79 (1st Cir. 1961) (roses); *Douglas Aircraft Co.* v. *Kerns,* 164 F.2d 1007, 1010 (10th Cir. 1947) (stream); *State Department of Environmental Protection* v. *Jersey Central Power and Light Co.,* 125 N.J. Super. 97, 308 A.2d 671 (1973), *aff'd,* 133 N.J. Super. 375, 336 A.2d 750, *rev'd on other grounds,* 69 N.J. 102, 351 A.2d 337 (1975) (fish); *Baillon* v. *Carl Bolander & Sons Co.,* 396 Minn. 155, 235 N.W.2d 613 (1975) (trees); and *Maldonado* v. *Connecticut Light & Power Co.,* 31 Conn. Sup. 536, 328 A.2d 120, 121 (1974) (shade tree).

The court below rejected this vast body of law and authorized the recovery of damages disproportionate to both the diminution in value of the affected property and the actual market value of the land. For this reason, we respectfully submit that the writ of certiorari should be granted to review this decision, since it is in direct and irreconcilable conflict with decisions of other federal courts of appeals and

17. RESTATEMENT (SECOND) OF TORTS § 929, Comment b (1979); *see, e.g.,* Heninger v. Dunn, 101 Cal. App. 3d 858, 162 Cal. Rptr. 104 (1980); Rector Wardens & Vestry of St. Christopher's Episcopal Church v. C. S. McCrossan, Inc., 306 Minn. 143, 235 N.W.2d 609 (1975).

constitutes such a departure from the usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION

The court of appeals' clear departure from this Court's recent ruling on the tests for asserting jurisdiction over nonresidents, its creation of a right of direct action not authorized by statute, and its promulgation of standards for measuring environmental damages in conflict with the traditional rules accepted by other federal courts of appeals, all call for review by this Court.

We therefore submit that a writ of certiorari should be granted, and, on the merits of this petition, that (1) the action should be dismissed as to the West of England defendants and (2) plaintiffs' claim for environmental damages should also be dismissed.

Respectfully submitted,

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